91-569

NO. _____

IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

STATE OF WASHINGTON;
WASHINGTON STATE PATROL;
GEORGE B. TELLEVIK,

Petitioners,

v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Is a state, which properly assumed Indian reservation jurisdiction pursuant to Pub. L. 83-280, nevertheless precluded from enforcing motor vehicle laws on state highways within an Indian reservation with respect to tribal members when the potential penalties do not include imprisonment?

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v.

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION;
LAWRENCE FRY,

Respondents.

The petitioners, the State of Washington, the Washington State Patrol and George B. Tellevik, Chief of the Washington State Patrol, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 938 F.2d 146 (1991) and is reprinted in Appendix A, p. A-1. The memorandum decision of the United States District Court for the Eastern District of Washing-

ton (Quackenbush, J.D.) has not been reported. It is reprinted in Appendix B, p. B-1.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on July 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Pub. L. 83-280 (67 Stat. 588 (1953)), Wash. Rev. Code § 37.12.010 (1989) and Wash. Rev. Code § 46.63.020 (1989). These statutes are reprinted in Appendix C, pp. C-1, C-3 and C-4, respectively.

STATEMENT

1. Statutory background.

Washington has a uniform system of laws governing all individuals who operate a motor vehicle on public streets and highways. Washington prohibits speeding,[1] driving through stop signs or stop lights,[2] driving without headlights during periods of darkness,[3] reckless driving,[4] and driving under the influence of intoxicating liquor or drugs,[5] and other prohibited driving practices.

Historically, all Washington traffic offenses were punishable by *either* a monetary penalty or imprisonment, or both.[6] Subsequently, in 1976 the Legislature provided that some offenses were punishable solely by a monetary penal-

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[1]Wash. Rev. Code § 46.61.400 (1989).

[2]Wash. Rev. Code § 46.61.050 (1989)

[3]Wash. Rev. Code § 46.37.020 (1989)

[4]Wash. Rev. Code § 46.61.500 (1989).

[5]Wash. Rev. Code § 46.61.502 (1989).

[6]*See* 1965 Wash. Laws, Ex. Sess., ch. 155, § 2; Wash. Rev. Code § 9.92.030 (1989).

ty.[7] For example, at present, speeding and failure to stop at a stop sign or stop light are punishable solely by a monetary penalty.[8] Reckless driving is punishable by a monetary penalty *or* imprisonment.[9] Driving while under the influence of intoxicating liquor or drugs is punishable by *both* a monetary penalty *and* imprisonment.[10]

Traffic offenses punishable solely by a monetary penalty are called traffic infractions.[11] Traffic infractions are prosecuted by the state before a court sitting without a jury. The burden is on the state to establish the commission of the infraction by a preponderance of the evidence.[12]

In 1953 Congress enacted Pub. L. 83-280 which authorized states to assume jurisdiction within Indian reservations.[13] In 1957, the State of Washington responded to Pub. L. 83-280 by enacting 1957 Wash. Laws, ch. 240, which obligated the State to assume criminal and civil jurisdiction over Indians and Indian territory when requested by the governing body of the Indian reservation. Subsequently, in 1963 Washington amended that statute to provide, without requiring tribal consent, criminal and civil jurisdiction on all Indian reservations, except for Tribal members on trust or Tribal properties. Wash. Rev. Code § 37.12.010 (1989)[14].

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[7]1975-76 Wash. Laws, 2nd Ex. Sess., ch. 95, § 1.

[8]Wash. Rev. Code §§ 46.63.020, .110 (1989).

[9]Wash. Rev. Code §§ 46.63.020(33), 46.61.500, 9.92.030 (1989).

[10]Wash. Rev. Code §§ 46.63.020(34), 46.61.515 (1989).

[11]Wash. Rev. Code § 46.63.020 (1989).

[12]Wash. Rev. Code § 46.63.090 (1989).

[13]Pub. L. 83-280, § 2 is codified at 18. U.S.C. § 1162 (p. C-1). Pub. L. 83-280, § 4 is codified at 28 U.S.C. § 1360 (p. C-2). Pub. L. 83-280, § 6 is set out in 67 Stat. 589 (1953) (p. C-3).

[14]Washington acted pursuant to § 6, Pub. L. 83-280 which authorized states to assume jurisdiction over criminal offenses and civil causes of action in Indian country without consulting with or securing the consent of the Tribes that would be effected. *See State of Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 471-74 (1979).

The 1963 enactment further provided that for Tribal members on Tribal and trust properties, the State specifically obligated itself to exercise jurisdiction for eight specific subject areas including the "[o]peration of motor vehicles upon the public streets". Wash. Rev. Code § 37.12.010(8) (1989). In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), this Court upheld the validity of Washington's assumption of jurisdiction in 1963.[15]

2. **Incident giving rise to this litigation.**

On May 21, 1988, Lawrence Fry, an enrolled member of the Colville Tribes, was issued a citation by a Washington State Patrol officer for speeding on State Highway 97 as it runs through the Colville Indian Reservation. State Highway 97 is a major public highway, built and maintained by the State of Washington.

After receiving the citation, Mr. Fry neither paid the prescribed monetary penalty for speeding, nor did he contest the citation in state court. Instead, Mr. Fry and the Confederated Tribes of the Colville Reservation instituted an action in Federal District Court for the Eastern District of Washington. Mr. Fry asserted jurisdiction pursuant to 28 U.S.C. § 1343 alleging that it was a violation of his civil rights to be subject to state court proceedings. The Colville Tribes asserted jurisdiction, both on their own behalf and on behalf of Mr. Fry, pursuant to 28 U.S.C. §§ 1331 and 1362, challenging the state's authority to issue citations to Tribal members for speeding on a state highway within the Colville Reservation and alleging infringement of their Tribal sovereignty.

The United States District Court granted the state defendants' cross-motion for summary judgment and ordered

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[15]This is in contrast to the action of South Dakota. The very limited scope of jurisdiction asserted by South Dakota did not meet the requirements of Pub. L. 83-280. *See Rosebud Sioux Tribe v. South Dakota*, 900 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 2009 (1991).

dismissal of the action (App. B, p. B-1). The District Court concluded that Washington courts have jurisdiction to hear cases involving traffic violations, occurring on public roads within the reservation, when such roads were built wholly or in part with government funds.

The Tribes and Mr. Fry appealed to the United States Court of Appeals for the Ninth Circuit, which on July 5, 1991, reversed the decision of the District Court. The Ninth Circuit concluded that the state cannot assert jurisdiction over Tribal members on the Colville Reservation for traffic infractions (App. A, p. A-1).

REASONS FOR GRANTING THE WRIT

1. The decision below departs from *Cabazon* by focusing primarily on the legal possibility of imprisonment instead of analyzing the state's public policy and the federal, Tribal, and state's interests.

In Part I of the decision below, *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991), the primary holding is that Tribal members, driving on public roads[16] within the reservation, are not subject to the same traffic offenses as other drivers, unless those offenses carry the legal possibility of imprisonment. *Id.* at 148. The Ninth Circuit has established a per se rule that a state traffic offense cannot be applied to a Tribal member on the reservation, unless the offense is punishable by imprisonment.

In Washington if a motorist drove 85 miles per hour in a 55 miles per hour zone, the motorist might be cited for speeding (an infraction that is not punishable by imprisonment) or reckless driving (an offense that is punishable by

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[16]This case concerns state jurisdiction on public roads built and maintained by Washington. It does not concern roads built and maintained by the Tribes. Also, this case does not present a question of whether the Tribes can exercise concurrent jurisdiction over their members, when state jurisdiction is acquired pursuant to Pub. L. 83-280. *See Washington v. Yakima Indian Nation*, 439 U.S. 466, 488, n. 32.

imprisonment), or both. Prior to the 1976 state removal of the remote prospect of imprisonment for speeding, a Colville Tribal member driving on a public highway within the reservation could be cited in the prior example for speeding or reckless driving. However, the Ninth Circuit has concluded that although the State did not change its public policy prohibiting speeding, it did lose jurisdiction by changing the punishment. The court's focus on the possibility of imprisonment as the test for state jurisdiction departs from this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Cabazon concerned the application of § 2 of Pub. L. 280 (18 U.S.C. § 1162) which governs state "jurisdiction over offenses committed by or against Indians". *Cabazon* also concerns state jurisdiction over Tribal members in the absence of express congressional consent. With regard to criminal jurisdiction under Pub. L. 280, § 2, this Court, in drawing a distinction between "civil/regulatory" laws and "criminal/prohibitory" laws stated that the shorthand test is whether the conduct violates "the State's public policy." The Court said:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub L 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub L 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

480 U.S. at 209 (emphasis added). But the Ninth Circuit made no inquiry regarding the state's public policy, it simply used the label "criminal."

In *Cabazon*, this Court did not end its analysis with Pub. L. 280, although the Tribes urged that it should. *Id.* at 214. The Court also discussed circumstances under which a state may exercise authority over the on-reservation activities of Tribal members, even in the absence of express congressional consent. *Id.* at 215. According to this Court

> [S]tate jurisdiction is preempted * * * if it interferes or is incompatible with federal and Tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority.

480 U.S. at 216 (quoting *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34 (1983)).

The tests that emerge from *Cabazon* are these: Under Pub. L. 280, § 2, the Court must determine if the conduct violates the state's public policy or, if state jurisdiction is not predicated upon Pub. L. 280, the Court must examine the federal, Tribal and state interests related to the assertion of state authority.

In *Cabazon* the Court applied these tests to the application of California gambling laws on a reservation. Although the violation of those laws included the legal possibility of imprisonment, the Court ruled that Pub. L. 280, § 2 did not apply. The Court reasoned that gambling did not violate California's public policy because "California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery". 480 U.S. at 211.

In weighing the federal, Tribal and state interests, the Court found that the employment and revenue from gambling fulfilled the overriding goal of Tribal self-sufficiency and economic development. 480 U.S. at 216. The Court concluded that the state interests at stake were not sufficient to justify the assertion of state authority over gambling on the reservation.

The Court applied a similar balancing test in *Rice v. Rehner*, 463 U.S. 713 (1983). *Rice* concerned state regulation of liquor sold on the reservation. The case did not involve Pub. L. 280 so the Court focused on the federal, Tribal and state interests. The only Tribal interest asserted was Indian self-governance. 463 U.S. at 721. And the Court found in "the area of liquor regulation * * * no 'congressional enactments demonstrating a firm federal policy of promoting tribal self-sufficiency and economic development.'"

Id. at 724. Against these limited federal and Tribal interests, the Court found an important state interest:

> The State has an unquestionable interest in the liquor traffic that occurs within its borders * * *. Liquor sold by Rehner to other Pala Tribal members or to nonmembers can easily find its way out of the reservation and into the hands of those whom, for whatever reason, the State does not wish to possess alcoholic beverages, or to possess them through a distribution network over which the State has no control.

463 U.S. at 724. Based on this balancing of interest, the Court gave little weight to any asserted interest in Tribal sovereignty. *Id.* at 725. The Court went on to find that "Congress authorized, rather than pre-empted, state regulation over Indian liquor transactions." *Id.* at 726.

The court below articulated the *Cabazon* test with regard to Pub. L. 280, § 2—whether the conduct at issue violates the state's public policy—but the court failed to apply it. The court focused instead on the absence of the legal possibility of imprisonment. The court stated:

> The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which henceforth are subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. Speeding is now punishable by a set fine rather than a jail term[.]

938 F.2d at 148.

Except for its discussion of imprisonment, the court below failed to analyze the state's public policy. Traffic offenses such as speeding are against the public policy of Washington. When the state assumed jurisdiction on all Indian reservations in 1963, it specifically included in all situations the operation of motor vehicles on public streets. Wash. Rev. Code § 37.12.010(8) (1989).

The court below failed to consider the strong interest of the state to protect the lives and property of all users of its

highways both on and off the reservation. In 1990, there were 44,529 deaths as a result of motor vehicle crashes on the nation's highways.[17] In 1989, there were 41,300 fatal accidents in the United States.[18] The National Safety Council estimates that over 26 percent of these fatal accidents were the result of driving too fast.[19]

It is essential that persons driving on the same highways be subject to the same standards. Noncompliance with those standards and prohibitions increases the risks to all on the public highways. Accordingly, one of the primary purposes of the enforcement of motor vehicle operating standards is to reduce the degree of noncompliance and, thus, improve highway safety. Yet the Ninth Circuit concluded that Tribal members who use a highway in common with other motorists, are not even subject to those uniform standards and prohibitions that are not enforced with the sanction of imprisonment.[20] Furthermore, the circuit court decision is not predicated upon any requirement that the Tribe enact and enforce comparable standards for its members. If the court had so ruled, it would have meant that jurisdiction authorized by Congress and accepted by a state could be preempted by the unilateral act of a Tribe in enacting a traffic code.[21]

The court ignored the state's strong policy against prohibited driving practices. In contrast to *Cabazon*—where this Court noted that California actually promoted state gambling through the state lottery—Washington does not promote prohibited driving practices. Washington does not

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[17]Ins. Inst. for Highway Safety, *Fatality Facts 1991* (1991) at 1.

[18]National Safety Council, *Accident Facts 1990 Edition* (1990) at 51.

[19]*Id.* at 62.

[20]Without stopping a vehicle, there is virtually no way a law enforcement office can determine whether the driver may have immunity from the application of various Washington traffic laws.

[21]In the instant situation, the Colville Tribe enacted as a tribal ordinance many provisions of the state traffic code.

promote speeding; Washington does not promote driving through stop signs and stop lights; Washington does not promote reckless driving; and Washington does not promote driving under the influence of intoxicating liquor or drugs.

The court below also failed to analyze the federal, Tribal and state interests involved in the enforcement of state motor vehicle laws with regard to Tribal members on the reservation.

The Ninth Circuit departed from this Court's decision in *Cabazon* by misconstruing the permissible scope of state jurisdiction authorized by Pub. L. 280 and by declining to analyze the state's policy and the federal, Tribal and state interests involved. Instead, the Court established a per se rule—if an offense does not include the legal possibility of imprisonment, the law cannot be enforced against Tribal members on the reservation.

2. **The decision below is in conflict with a decision from the Seventh Circuit.**

The reasoning in Part II of the decision below is in conflict with *St. Germaine v. Circuit Court for Vilas Cy.*, 938 F.2d 75 (7th Cir. 1991). Part II provides an alternate holding that Pub. L. 280 does not apply because speeding is a subset of the permitted activity of driving. The Ninth Circuit said:

> Thus, although the government is correct that *speeding* remains against the state's public policy, *Cabazon* teaches that this is the wrong inquiry. *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited. * * *
>
> We conclude that unregulated, high-stakes bingo was an extreme extension of a permitted activity, it was incident to that general activity and thus lay within the ambit of that activity. Similarly, here speeding is but an extension of driving—the permitted activitity—which occasionally is incident to the operation of a motor vehicle.

938 F.2d at 148-49.

The logic of the Ninth Circuit's application of a kind of "set theory" is amazing and the consequences are severe. That characterization is that even prohibited driving practices are merely a subset of driving which is permitted. Under that approach or rationale, illegal drug use is simply a subset because there are legal uses of prescription drugs. *Cabazon* was not based on such a metaphysical test. It was based on a thorough analysis of California's public policy with regard to gambling—an analysis the court below declined to undertake.

Under the Court's reasoning in Part II of the decision, Washington could not enforce its speed restrictions even if the penalty included the possibility of imprisonment. Taken to its logical conclusion, reckless driving and driving under the influence of intoxicating liquor and drugs are also subsets of the permitted activity of driving, even though both offenses are punishable by imprisonment. The decision invites a challenge by such offenders.

The Court's reasoning in Part II is in direct conflict with *St. Germaine*. In that case, "an enrolled member of the tribe of Lac du Flambeau Band of Lake Superior Chippewa Indians, was convicted in state court of operating his motor vehicle on a state highway within the reservation after his driver's license had been suspended." 938 F.2d at 75. The Court of Appeals for the Seventh Circuit undertook the proper inquiry and analyzed state policy. The Seventh Circuit ruled that the Wisconsin State Motor Vehicle Code applied to the Tribal member on the reservation. The court said:

> Wisconsin does not seek to do something on the reservation to Indians that it does not do everywhere in the state and to all offenders. It is understandably an important matter of Wisconsin public policy to protect the lives and property of all users of its highways, on or off the reservation, Indians or non-Indians.* * * The shorthand test the Court prescribes is based on a determination of whether the conduct at issue violates the state's public policy. * * * The State of Wisconsin seeks to protect the lives and property of highway

> users from all incompetent, incapacitated, and dangerous drivers anywhere on its highways on a reservation or off. A clear and mandatory criminal penalty is imposed to enforce its prohibitions. This is public policy enforcement of high order. The state's public policy of enforcing this criminal penalty and deterring dangerous drivers does no violence to any tribal vehicle regulation which the tribe enforces.

938 F.2d at 77.

This statement of Wisconsin public policy is equally applicable to the State of Washington. Both states strive in an evenhanded manner to protect the lives and property of highway users from the actions of dangerous drivers.

The conflict between the reasoning in Part II of the Ninth Circuit's decision and the reasoning in the Seventh Circuit's decision in *St. Germaine* is obvious. The Ninth Circuit—applying a kind of "set theory—reasoned that traffic offenses were not applicable to Tribal members on the reservation because driving offenses were merely a subset of driving. The Seventh Circuit—applying the public policy test in *Cabazon* to the same subject matter, *i.e.*, traffic codes—reasoned that traffic offenses were applicable to Tribal members on the reservation because of the state public policy of deterring dangerous driving.

3. **This case is the appropriate vehicle to resolve the issues raised by the decision below.**

The Ninth Circuit's departure from *Cabazon*, by establishing a per se test, *i.e.*, possibility of imprisonment is an important question of federal law that should be resolved by this Court.

In *Bryan v. Itasca Cy.*, 426 U.S. 373 (1976), this Court ruled that Pub. L. 280, § 4 granted state jurisdiction over private civil litigation involving reservation Indians in state court. *Bryan* noted that it was not authorization for a general extension of state regulatory jurisdiction. The underpinning of that conclusion was a concern which was consistent with the House Committee Report on HR 1063 (Pub. L. 83-280) that the legislation "should retain the ap-

plication of Indian Tribal customs and ordinances to civil transactions among the Indians, insofar as those customs and ordinances are not inconsistent with applicable state laws." 1953 U.S. Code Cong. & Admin. News, 2412. The concerns of *Bryan* not to permit states to override Tribal customs has lead to the distinction between the state's enforcement of its public policy by prohibitory laws on one hand and state regulatory actions on the other.

In *Cabazon* this Court, in light of that distinction, ruled that the state did not have jurisdiction over offenses under Pub. L. 280, § 2, simply because the violation of state law was punishable by imprisonment. The focus of this Court in *Cabazon* was upon the state's public policy, not the punishment involved. The Ninth Circuit has taken the major step to conclude that the possibility of imprisonment is a prerequisite for jurisdiction under Pub. L. 280, § 2—even if there is no question that the prohibited activity violates the state's public policy. This is an important question of federal law that should be resolved and rejected by this Court.

This case presents this issue cleanly and directly because the only variable is the punishment imposed for violating the law. Prior to 1976 speeding was punishable by a monetary penalty or imprisonment. Subsequently, the possibility of imprisonment was removed. The public policy of the state to deter dangerous driving remained unchanged. The only change was the punishment for speeding. Thus, the question is directly presented whether eliminating the possibility of imprisonment automatically eliminates state jurisdiction over offenses pursuant to Pub. L. 280, § 2.

This question also has significance beyond the state of Washington. Many states have adopted motor vehicle laws that are enforced by monetary penalties and do not include the possibility of imprisonment.[22] Under the Ninth Circuit's decision those laws could not be enforced with regard to a Tribal member on a public highway within an Indian

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[22]*See, e.g.*, Note, *Civil Infractions for Minor Traffic Offenses: Michigan's New Motor Vehicle Code*, 26 Wayne L. Rev. 1543, 1558-60 (1980).

reservation. The absence of the remote legal possibility of imprisonment would automatically exclude state jurisdiction pursuant to Pub. L. 280, § 2 without any consideration being given to the public policy of the state. This is an important question of public safety that should be addressed by this Court.

Finally, the conflict between the reasoning of Part II of the Ninth Circuit's decision and the reasoning of the Seventh Circuit's decision in *St. Germaine* is significant. The 50 states are responsible for enforcing traffic laws on the public highways within these states. This has been a traditional state activity—not a federal or Tribal activity. The "set theory" advanced by the court below questions the enforceability of those laws on Indian reservations with regard to Tribal members and is in conflict with the Seventh Circuit. The conflict between the circuits goes to the heart of a traditional state responsibility. This Court should grant certiorari to resolve this matter.

CONCLUSION

For these reasons we respectfully request that the writ be granted.

DATED this 3rd day of October, 1991.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION; LAWRENCE FRY,

Plaintiffs-Appellants,

V.

STATE OF WASHINGTON; WASHINGTON STATE PATROL; GEORGE B. TELLIVEK,

Defendants-Appellees.

NO. 89-35025
D.C. No. CV-88-394 JLQ

Appeal from the United States District Court
for the Eastern District of Washington
Justin L. Quackenbush, District Judge, Presiding

Argued and Submitted
January 9, 1990—Seattle, Washington

Filed July 5, 1991

Before: M. Oliver Koelsch, James R. Browning and Robert R. Beezer, Circuit Judges.

Opinion by Judge Koelsch

SUMMARY

Jurisdiction

Reversing a district court judgment, the court of appeals held that the State of Washington (the State) did not have jurisdiction over on-reservation Indians to enforce its statute prescribing speed limits for motor vehicles operated upon public roads within the reservation.

Appellants Confederated Tribes of The Colville Reservation challenged the State of Washington's enforcement of traffic laws within the reservation. Washington treats speeding as a civil, not a criminal offense. The Tribe sought a declaration prohibiting the State from enforcing its asserted traffic violation and a judicial declaration that the matter is governed by tribal law and enforceable only by officers duly commissioned by the Tribes and in the Tribes' own court. The district court entered judgment for the State.

[1] States have been authorized to impose both civil and criminal state laws within the reservations. [2] While the delegated powers to the states over criminal matters are broad, the scope of the provision relating to civil matters is very limited. [3] The issue was whether or not the Washington law relating to speeding should be classified either as criminal/prohibitory or civil/regulatory. The shorthand test was whether the conduct at issue violated the State's public policy.

[4] The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which are now subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. [5] The Washington State courts have found a traffic infraction not to be a felony or misdemeanor. [6] Thus, the State's avowed public policy is served by treating speeding as a civil/regulatory offense. [7] To look to the Tribes rather than the State for traffic enforcement on the reservation will not detract from Washington's determination to discourage speeding. [8] The court noted that concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory, civil regulatory test. Under it, the State may not assert jurisdiction over tribal members on the Colville reservation.

COUNSEL

Michael Taylor, Colville Confederated Tribes, Nespelem, Washington, for the plaintiffs-appellants.

Edward Mackie, Assistant Attorney General; Timothy R. Malone, Assistant Attorney General, Olympia, Washington, for the defendants-appellees.

OPINION

KOELSCH, Circuit Judge:

This appeal involves a dispute between the Confederated (Indian) Tribes of the Colville Reservation together with Lawrence Fry, an enrolled member (the Tribes), and the State of Washington with respect to one of the latter's motor vehicle traffic laws.

The issue is one of law: does the State of Washington possess jurisdiction over on-reservation Indians to enforce its statute prescribing speed limits for motor vehicles operated upon public roads within, and thus a part of, the reservation?

The District Court concluded that the answer is "yes". We disagree.

The facts are undisputed: on May 21, 1988, Lawrence Fry, an enrolled member of the Tribe, while operating his motor vehicle on Highway 97 within the Reservation was stopped by a Washington State Patrol officer for exceeding the Washington State speed limit. The officer was not commissioned by the Tribe to enforce tribal traffic laws; because Washington treats speeding as a civil, not a criminal, offense, the officer gave Fry a civil complaint pursuant to RCW 46.63.

However, Fry did not pay the prescribed fine nor contest the complaint in state court; instead he and the Tribes commenced this action in the Federal District court seeking to prohibit the State from enforcing its asserted traffic violation and to secure a judicial declaration that the matter is

governed by tribal law and enforceable only by officers duly commissioned by the Tribes and in the Tribes' own court.

[1] Historically, the power to legislate in both criminal and civil matters concerning Indians and their acts and conduct upon their reservations lay exclusively with the Congress and the tribes themselves. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 214 (1987). However, in 1953 Congress enacted Public Law 280, which delegated to the states power to impose state laws, both civil and criminal, within the reservations. Public Law 83-280, 67 Stat. 588.[1] Because Congress' "primary concern", *Bryan v. Itasca County*, 426 U.S. 373, 379 (1976), lay in the lawlessness on some reservations and the absence of tribal institutions for law enforcement, it delegated to the States broad powers over criminal matters. Thus, section 2, 18 U.S.C. § 1162 reads as follows:

> § 1162. State jurisdiction over offenses committed by or against Indians in the Indian country
> (a)* * *[t]he States* * * shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country * * * to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State * * *.

Pub. L. 83-280, § 2, 18 U.S.C. § 1162.

[2] In marked contrast, the scope of the provision relating to civil matters is very limited. It provides:

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[1]In 1963, Washington assumed criminal and civil jurisdiction for acts committed by Indians on Indian lands in eight specific subject areas, including the operation of motor vehicles on public roads. RCW 37.12.010. To assume jurisdiction beyond these eight areas, Washington needed either an express grant from Congress or tribal consent. A subsequent statute, the Indian Civil Rights Act, 82 Stat. 78, 25 U.S.C. §§ 1321-1326, imposed a more stringent tribal consent requirement for a state to assume jurisdiction over Indians on Indian land, but the change did not affect any cession of jurisdiction already made. 25 U.S.C. § 1323(b); 25 U.S.C. § 1321(a), 1322(a).

> § 1360. State civil jurisdiction in actions to which Indians are parties
>
> (a) * * * [T]he States * * * shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country * * * to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State * * *.

Pub. L. 83-280, § 4, 28 U.S.C. § 1360.

Moreover, as the Court in *Bryan* noted, it was not the Congress' intention to extend to the States the "full panoply of civil regulatory powers," 426 U.S. at 388, but essentially to afford Indians a forum to settle private disputes among themselves.

[3] Both the Tribes and the State agree the dispute in this instance is not within the purview of section 4. Rather, the issue is whether or not the Washington law relating to speeding should be classified either as criminal/prohibitory or civil regulatory. *Barona Group of Captian* [sic] *Grande Band of Mission Indians, San Diego County, Cal. v. Duffy*, 694 F.2d 1185, 1188 (9th Cir. 1982). If the former, then Washington possesses jurisdiction and its law can be enforced, but if the latter then such power is lacking. Laws which prohibit absolutely certain acts fall into the first category, while those generally permitting certain conduct but subject to regulation are within the second. "The shorthand test is whether the conduct at issue violates the State's public policy." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 209 (1987).

I.

Turning now to the issue under consideration, it appears that in 1979 the state legislature amended Washington's traffic offense statutes to "decriminalize" several traffic offenses, including speeding, and designated each as a "traffic infraction": "a traffic infraction may not be classified as a criminal offense." RWC [sic] 46.63.020. Although this language is clear and unequivocal, in an inquiry such

as this we must examine more than the label itself to determine the intent of the State and the nature of the statute, *Cabazon*, 480 U.S. at 221 n.10, keeping in mind that "the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973), quoting *Rice v. Olson*, 324 U.S. 786, 789 (1945). Thus, Indian tribal sovereignty provides the "backdrop against which the applicable * * * federal [and state] statutes must be read." *McClanahan*, 411 U.S. at 172.

[4] The Washington legislature in amending its traffic statutes carefully distinguished those offenses like speeding, which henceforth are subject to only civil penalties, from a long list of offenses like reckless driving or driving while intoxicated, which remain criminal. Speeding is now punishable by a set fine rather than a jail term; the monetary penalty imposed for violation may not exceed $250; the penalty must be paid by its due date, else the offender's driver's license is not renewed until the fine and a late fee is received; and should the driver contest the complaint he is not allowed a jury trial. RCW 46.63.020, 090, 110.

[5] By decriminalizing these offenses, the legislature aimed to "promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." The Washington state courts have found a traffic infraction not to be a felony or misdemeanor. *See, e.g., City of Wenatchee v. Durham*, 43 Wn. App. 547, 551 n.3, 718 P.2d 819, 822 n.3 (1986). And the Washington Attorney General has opined that traffic infractions are "no longer a criminal offense", 4 Op. Att'y Gen. 2 (1981).

[6] Thus, the state's avowed public policy is served by treating speeding as a civil/regulatory offense. Indeed, to treat it otherwise would allow Washington to have it both ways. We conclude the state may not declare certain infractions as civil, remove the panoply of constitutional and procedural protections associated with criminal offenses, save itself the time and expense of criminal trials, and then in-

sist the same infraction is criminal for purposes of expanding state jurisdiction and appropriating the revenue raised through enforcement of the speeding laws. *See Mayers v. United States Dept. of Health and Human Services*, 806 F.2d 995, 998 (11th Cir. 1986) (if statute criminal in nature, procedure employed constitutionally inadequate).

II.

Several cases applying the civil/regulatory versus criminal/prohibitory test support this conclusion. In *Cabazon*, the Court held a California law establishing misdemeanor criminal penalties for operating bingo games except in accord with specific regulations was civil/regulatory and therefore unenforceable on an Indian reservation. *Cabazon*, 480 U.S. at 211. The Court concluded "in light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits gambling in general and bingo in particular." *Id.* The Court rejected California's argument that high stakes, unregulated bingo was prohibited and a misdemeanor, and therefore against public policy. As it said: "[b]ut that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of P.L. 280." *Id.*

[7] Thus, although the government is correct that *speeding* remains against the state's public policy, *Cabazon* teaches that this is the wrong inquiry. *Cabazon* focuses on whether the prohibited activity is a small subset or facet of a larger, permitted activity—high-stakes unregulated bingo compared to all bingo games—or whether all but a small subset of a basic activity is prohibited. Thus, in *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977) we found Washington's fireworks statute to be criminal/prohibitory because, with very limited exceptions, Washington prohibited all private possession and sale of fireworks. To allow tribal members to operate fireworks stands on reservations would "entirely circumvent Washington's determi-

nation that the possession of fireworks is dangerous," *Marcyes*, 557 F.2d at 1364. But to look to the Tribes rather than the state for traffic enforcement on the reservation will not detract from Washington's determination to discourage speeding.[2]

We conclude that unregulated, high-stakes bingo was an extreme extension of a permitted activity, it was incident to that general activity and thus lay within the ambit of that activity. Similarly, here speeding is but an extension of driving—the permitted activity—which occasionally is incident to the operation of a motor vehicle.

[8] Concern for protecting Indian sovereignty from state interference prompted courts to develop the criminal/prohibitory—civil regulatory test. *United States v. Dakota*, 796 F.2d 186, 188 (6th Cir. 1986). That concern leads us to resolve any doubts about the statute's purpose in favor of the Indians. *See Bryan*, 426 U.S. at 392. Indian sovereignty and the state's interest in discouraging speeding are both served by our decision here: the Tribes have enacted a traffic code, employ trained police officers, and maintain tribal courts staffed by qualified personnel to deal with criminal traffic violations. The Tribes are willing and able to enforce their own traffic laws against speeding drivers and even to commission Washington state patrol officers to assist them. We conclude RSW [sic] 46.63 should be characterized as a civil, regulatory law.[3] Under it, the state may not assert jurisdiction over tribal members on the Colville reservation.

REVERSED with directions to the District Court to grant Appellants the relief sought.

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[2]Thus, we reject the state's argument that uniformity in highway safety laws requires state jurisdiction, at least where the Tribes have shown their own highway safety laws and institutions are adequate for self-government. *Cf. County of Vila v. Chapman*, 361 N.W. 2d 699 (Wis. 1985) (tribe had no tradition of self-government in the area of traffic regulation).

[3]Our disposition makes it unnecessary for us to address the Tribes' other arguments on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES OF
THE COLVILLE RESERVATION,
on their own behalf and on behalf of
Lawrence Fry, and Lawrence Fry
on his own behalf,

Plaintiffs,

V.

The State of Washington,
The Washington State Patrol,
and George B. Tellivek, Chief of the
Washington State Patrol,

Defendants.

No. C-88-394-JLQ

ORDER GRANTING DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND ORDER OF DISMISSAL WITH PREJUDICE

BEFORE THE COURT are plaintiffs' motion for summary judgment or, in the alternative, for preliminary injunction, and defendants' cross-motion for summary judgment. A hearing was held on October 3, 1988. Plaintiffs were represented by Michael Taylor. Terese Neu Richmond appeared for defendant. Having reviewed the record, heard from counsel, and being fully advised in this matter, this order is intended to memorialize the court's ruling on this matter.

FACTUAL BACKGROUND

State Highway 97, a highway built and maintained by the State of Washington, runs through the Colville Indian Reservation. On May 21, 1988, Lawrence Fry, an enrolled

member of the Colville tribes, was issued a citation by a Washington State Patrol officer for speeding on Highway 97. The citation required that he appear before the State District Court for Okanogan County. Plaintiffs challenge this procedure as an infringement on tribal sovereignty and their civil rights under federal law, in violation of Congress' limited grant of jurisdiction to the states through Public Law 280 and 25 U.S.C. § 1326. Plaintiffs claim that Mr. Fry's traffic charge must be tried in the Colville Tribal Court. Plaintiffs also assert that this unlawful state action deprives them of the revenues derived from traffic enforcement and deprives them of the right to consent to any new exercise of state jurisdiction mandated by 25 U.S.C. § 1326. They ask the court to declare that the state must utilize tribal law and the Colville Tribal Court in its enforcement scheme when Indians are cited for infractions occurring on the reservation.

The Tribes have enacted their own civil infraction traffic code, based on Washington's statutes, which is enforced by tribal police and tribal courts (Ct.Rec. 5, Ex. D). The Tribes have issued tribal police commissions to area city and county police so that they may enforce tribal law on the reservations. The State of Washington has not accepted such commissions. (Ct. Rec. 5, Ex. C).

ANALYSIS

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the facts before the court. *Zweig v. Hearst Corp.*, 521 F.2d 1129 (9th Cir. 1975). Although the parties have not submitted statements of material fact, as required by Local Rule 56, both parties base their motions on the lack of any material facts in dispute. The issues raised in this complaint and these motions are pure issues of law. Therefore, summary judgment is appropriate.

Legislative Background

In 1953, by enactment of Pub.L.No. 83-280, 67 Stat. 588, (Pub.L. 280) Congress delegated to the states some of

its power to regulate affairs on Indian reservations. *United States v. Farris*, 624 F.2d 890, 894 (9th Cir. 1977). Section 7 provided:

> The consent of the United States is hereby given to any [] State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Pub. L. 280, Laws of 1953, Chapter 505. This law was designed to end the federal government's responsibility toward the Indians by consenting to an affirmative assumption of civil and criminal jurisdiction by the states. *State ex rel. Adams v. Superior Ct.*, 57 Wn.2d 181, 183, 356 P.2d 985 (1960). In 1957, the state of Washington responded to this offer by enacting Ch. 240, § 1, which stated that:

> The state of Washington hereby obligates and binds itself to assume, as hereinafter provided, criminal and civil jurisdiction over Indians and Indian territory, reservation, country and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session.)

In 1963, Washington amended that section, limiting its assumption of criminal and civil jurisdiction for acts committed by Indians on Indian lands to eight specific subject areas, chiefly welfare, family law and motor vehicles. RCW 37.12.010.[1] Subsequent challenges of the method by which

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[1]RCW 37.12.010 states:

"Assumption of criminal and civil jurisdiction by the state. The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and land within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

the state legislature authorized assumption of jurisdiction over Indians,[2] the language of the statute,[3] and the assumption of only partial jurisdiction,[4] have been unsuccessful.

With the exception of the eight enumerated areas of RCW 37.12.010, Washington state courts lack jurisdiction over Indians on Indian lands beyond that expressly granted by Congress, absent tribal consent. *State ex. rel. Adams v. Superior Ct.*, 57 Wn.2d 181, 185, 356 P.2d 985 (1960); *United States v. Farris*, 624 F.2d 890, 895 (9th Cir. 1980). Such consent was granted by the Colville Tribes[5] in January 1965, when the Colville Business Council issued Resolution 1965-4 requesting that the state of Washington assume complete criminal and civil jurisdiction. Pursuant to this request and the authority conferred by Pub.L. 280, Gover-

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(Footnote Continued)

"(1) Compulsory school attendance;

"(2) Public assistance;

"(3) Domestic relations;

"(4) Mental illness;

"(5) Juvenile delinquency;

"(6) Adoption proceedings;

"(7) Dependent children; and

(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: Provided further, That Indian Tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

[2]States such as Washington, whose constitutions or statutes contained organic law disclaimers of jurisdiction over Indian country, were dealt with in § 6 does not require disclaimer states to amend their constitutions to make an effective acceptance of jurisdiction. In addition, any Enabling Act requirement of such a nature was held to have been effectively repealed by § 6. *Washington v. Yakima Indian Nation*, 439 U.S. 463,

nor Daniel J. Evans issued a proclamation assuming, on behalf of the State, the requested jurisdiction. *Tonasket v. State*, 84 Wn.2d 164, 166, 525 P.2d 744 (1974).

In 1968, Congress passed the Indian Civil Rights Act. 82 Stat. 78, 25 U.S.C. §§ 1321-1326. The effect of this act was to retract from the states some of the power conferred by Pub.L. 280. Title IV repealed § 7 of Pub.L. 280, with the

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(Footnotes Continued)

493 (1979). The Washington Supreme Court likewise held that the legislative method of assuming state civil and criminal jurisdiction was not a violation of the state's enabling act or constitution, nor was it a violation of the method prescribed in Public Law 83-280 for the assumption of such jurisdiction. *Makah Indian Tribe v. State*, 76 Wn.2d 485, 491, 457 P.2d 590 (1969).

[3]In *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), the Supreme Court held that Yakima tribe's challenge that chapter 36 was void for indefiniteness was without merit.

> Chapter 35 creates no new criminal offenses but merely extends jurisdiction over certain classes of offenses defined elsewhere in state law. * * * The eight subject matter areas are themselves defined with reasonable clarity in language no less precise than that commonly accepted in federal jurisdictional statutes in the same field. (cite omitted) The District Court's ruling that Chapter 36 is not void for vagueness under the Due Process Clause of the Fourteenth Amendment was therefore correct.

Id. at 469 n. 5.

[4]The Supreme Court recognized that under the laws in effect in 1963 the State of Washington could have unilaterally extended full jurisdiction over crimes and civil causes of action on Indian reservations. Therefore, it was unwilling to find that by "asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request" the state had somehow flouted the will of Congress. The court went on to say that "[a] state that has accepted the jurisdictional offer in Pub. L. 280 in a way that leaves substantial play for tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. *Washington v. Yakima Indians*, 439 U.S. 463, 499 (1979).

effect that tribal consent is now required as a condition to further state assumptions of jurisdiction.[6] However, Congress provided that "this repeal shall not affect any cession of jurisdiction made pursuant to [section 7] prior to its re-

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(Footnotes Continued)

[5]The Colville Confederated Tribes consist of 11 separate Indian tribes placed upon the Colville Indian Reservation in 1872. The confederacy is recognized by the Bureau of Indian Affairs and is governed by a tribal business council pursuant to a constitution and bylaws adopted and officially approved in 1938. *Tonasket v. State*, 84 Wn.2d 164, 165-66, 525 P.2d 744 (1974).

[6]25 U.S.C. § 1321(a) provides:

"The consent of the United States is hereby given to any State not having jurisdiction over criminal offenses committed by or against Indians in the areas of Indian country situated within such State to assume, with the consent of the Indian tribe occupying the particular Indian country or part thereof which could be affected by such assumption, such measure of jurisdiction over any or all of such offenses committed within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over any such offense committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State." (Emphasis added).

25 U.S.C. § 1322(a) provides:

"The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

peal. 25 U.S.C. § 1323(b). Previous assumptions of jurisdiction, such as RCW 37.12.010, remained valid unless retroceded by the State back to the United States. *Latender v. Israel*, 584 F.2d 817 (7th Cir.), *cert. denied*, 440 U.S. 1850 (1978).

The tribal consent required by Title IV must be manifested by a majority vote of the enrolled Indians within the affected area of Indian country.[7] Legislative action by the Tribal Council does not comport with the explicit requirements of the act. *Kennerly v. District Ct. of Montana*, 400 U.S. 423, 429 (1971). Thus, although RCW 37.12.010 would have been invalid if it were passed for the first time after 1968, it is recognized as a valid assertion of jurisdiction over the eight enumerated areas, including motor vehicles. *United States v. Farris*, 624 F.2d 890, 895 n.2 (9th Cir. 1980).

In 1986, the Colville Tribes requested, and the legislature and governor granted, retrocession of the broad grant of jurisdiction over both criminal and civil matters to the Tribes (Ct. Rec. 13, p. 14). The result was that the state retained only the limited jurisdiction asserted under RCW 37.12.010. Whether the state had the authority in the first instance to assert both criminal and civil jurisdiction over

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[7]25 U.S.C. § 1326 provides:

"State jurisdiction acquired pursuant to this title [25 USC §§ 1321 et seq.] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percent of such enrolled adults."

the operation of motor vehicles, therefore, becomes the critical factor here. *Civil v. Criminal Classification*

Under RCW 37.12.010, Washington assumed jurisdiction over Indians and Indian lands for both civil and criminal matters involving the operation of motor vehicles. In 1979, the state legislature amended Washington's traffic offense statutes to decriminalize certain offenses so as to "promote the public safety and welfare on public highways and to facilitate the implementation of a uniform and expeditious system for the disposition of traffic infractions." RCW 46.63.010. Pursuant to the amendment, only those offenses enumerated in RCW 46.63.020, or their equivalents in local laws or ordinances, remain classified as criminal offenses. All other traffic offenses, including speeding, are now classified as "traffic infractions". Jurisdiction to hear traffic infractions was conferred upon the district and municipal courts, rather than the superior court. RCW 46.63.040.

Plaintiffs argue that the effect of decriminalization of traffic offenses, and the conferring of jurisdiction on district courts to hear infractions, represents a new form of jurisdiction being asserted by the state, and as such requires the consent of a majority of the enrolled members of the Colville Tribes. Plaintiffs therefore ask the court to declare that the Washington State Patrol lacks authority to order Indians cited for traffic infractions on the reservation to appear before the state district court. Although plaintiffs' argument has some merit, it is not persuasive.

Plaintiffs argue that, should the court find that the state's assumption of jurisdiction over motor vehicles lies outside the scope of Pub. L. 280, or 25 U.S.C. §§ 1321 and 1322, then two barriers exist to the state's exercise of jurisdiction. First, the exercise of such authority may be preempted by federal law. Second, state jurisdiction may infringe upon the right of Indians to establish and maintain tribal self-government. *Yakima Indian Nation v. Whiteside*, 617 F. Supp. 735, 746 (D.C. Wash. 1985), *cert. granted*, 108 S.Ct. 2843; *Rice v. Rehner*, 463 U.S. 713, 718-19 (1983).

"State jurisdiction is preempted by federal law if it interferes with or is incompatible with federal and tribal interests reflected in federal law, unless the state interests at stake are sufficient to justify the assertion of state authority." *Whiteside, supra* at 746. Federal preemption may result from either a specific treaty between the tribe and the federal government, *McClanahan v. State Tax Commission of Arizona*, 411 U.S. 164, 172 (1973), or by pervasive federal regulation in a defined area which excludes state intervention. *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685, 690 (1965). Although the parties have cited no treaty provisions or federal regulation supporting a finding of preemption in the area of traffic regulation, this court finds it unnecessary to resolve this issue, in light of its determination of this case, *infra*.

The second barrier to the exercise of state jurisdiction is if it may infringe upon the right of Indians to establish and maintain tribal self-government. This issue is closely intertwined with preemption analysis. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court stated:

> When we determine that tradition has recognized a sovereign immunity in favor of the Indians in some respect, then we usually are reluctant to infer that Congress has authorized the assertion of state authority in that respect except where Congress has expressly provided that State laws shall apply. Repeal by implication of an established tradition of immunity or self-governance is disfavored. If, however, we do not find such a tradition, or if we determine that the balance of state, federal, and tribal interests so requires, our preemption analysis may accord less weight to the "backdrop" of tribal sovereignty.

Id. at 719-20.

The Tribes assert that they have a strong tradition of self-government, not only in the area of traffic "regulation," but in other areas as well. Coupled with this tradition of self-government, is the recognized importance of developing and utilizing Indian resources to the point where the Indians will be able to "fully exercise responsibility for the utilization and management of their own resources and where

they will enjoy a standard of living from their own productive efforts comparable to that enjoyed by non-Indians in neighboring communities." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S.Ct. 1083, 1092, n.19, quoting 15 U.S.C. § 1451). In *Cabazon* the Supreme Court quoted the President's 1983 Statement on Indian Policy, 19 Weekly Comp. Pres. Doc. (Jan. 24, 1983), in which he stated that it is important to the concept of self-government that tribes reduce their dependence on Federal funds by providing a greater percentage of the cost of their self-government. Id. at 1092 n.20. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *Id.* at 1093. The Tribes argue persuasively that absent the revenues from enforcement of traffic regulations, their ability to adequately fund their courts will be impaired. However, only those revenues lost from State Patrol citations are at issue here. The Tribes have offered no evidence regarding the extent of such lost revenues.

Wisconsin courts have, a number of times, addressed the question of state jurisdiction on public roads over reservation lands. In *State v. Lemieux*, 317 N.W. 2d 166 (Wis. App. 1982), the appellate court held that the state had failed to meet its burden to overcome the presumption that it lacked jurisdiction. *Lemieux* involved an enrolled member charged with possession of a loaded firearm in a vehicle traveling on a public road within the Bad River Indian Reservation. The court agreed that the statute prohibited, rather than regulated the behavior charged, but held that, in the absence of penal sanctions, it was not an offense over which the state acquired criminal jurisdiction under Pub.L. 280. The statute in question provided that violations were punishable by a forfeiture of not more than $100, combined with a natural resources assessment equal to 75 percent of the amount of the forfeiture. The court stated that

> [t]he purpose of construing ostensibly criminal statutes as civil regulatory statutes is to prohibit a state from extending its jurisdiction beyond that granted by Congress simply by making a wide range of conduct

> punishable by penal sanctions* * * .Absent any authority in which civil statutes have been deemed "criminal" for purposes of Pub.L. 280 jurisdiction and in light of the policy underlying the construction of criminal statutes set forth in [*United States v.*] *Marcyes*, [557 F.2d 1361 (9th Cir. 1977)] we cannot conclude that the state has jurisdiction to enforce sec. 29.224(2) under the criminal jurisdiction grant of Pub.L. 280.

Id. at 168. The court then went on to reject civil jurisdiction under Pub.L. 280, because that section affects only private civil litigation. Finally, the court rejected jurisdiction independent of that conferred by Pub.L. 280, on the basis that there was no specific grant of jurisdiction to the states; therefore, the presumption is that the state lacks jurisdiction. *Id.* at 169.

A year later the Wisconsin Supreme Court faced this issue in *State v. Webster*, 338 N.W. 2nd 474 (Wis. 1983). It held that the State did not have jurisdiction to prosecute enrolled Menominee Indians for traffic offenses committed on the state highway within the reservation boundaries. In reaching this decision, the court relied upon an unusual series of events whereby the federal government terminated the Tribe's status in 1954, thereby rendering the tribe subject to state jurisdiction, but later restored its tribal status. Pursuant to the Restoration Act, Wisconsin had retroceded its state jurisdiction over the reservation. Applying the analysis contained in *Rice v. Rehner*, 463 U.S. 713 (1983), the court concluded that (1) the Menominee Tribe had a tradition of tribal self-government in the area of traffic regulation, (2) the balance of state, federal and tribal interests in the regulation of Highway 47 tipped in favor of the Tribe where the conduct involved only Indians, (3) the federal government, under 18 U.S.C. § 1152, had granted the Indians jurisdiction over certain offenses, including those of the type charged, and (4) a finding of state jurisdiction would interfere with tribal self-government and impair a right granted or reserved by federal law. *Id.* at 482-83.

Two years later the Wisconsin Supreme Court reached the opposite conclusion, in *Vilas Cy. v. Chapman*, 361

N.W.2d 211 (Wis. 1985). Chapman had been charged with operating a motor vehicle after revocation, operating a motor vehicle while under the influence of an intoxicant, and operating a motor vehicle without a valid Wisconsin driver's license. The parties had agreed that the ordinance violation with which Chapman was charged was neither a crime nor a civil cause of action but, rather, was a civil regulatory matter, and that Pub.L. 280 did not address civil regulatory jurisdiction. *Id.* at 703. The court applied the *Rice* and *Webster* analysis, looking at whether the Tribe had a tradition of self-government in traffic regulation. It found none. Therefore, the balance of interests tipped in favor of the state. *Id.*, at 702.

Although these three decisions demonstrate that Wisconsin has in the past refused to recognize state jurisdiction for traffic offenses pursuant to Pub.L. 280, a similar conclusion today is unlikely, in light of the Supreme Court's 1987 decision that criminal jurisdiction depends upon whether the conduct at issue violates the State's public policy. *California v. Cabazon Band of Mission Indians*, 107 S.Ct. 1083.

Although this court would have difficulty recognizing state jurisdiction over traffic infractions should it determine that they are outside the scope of the consent conferred by Pub.L. 280, it must find, based upon the following, that RCW 37.12.010 is a valid assumption of jurisdiction under Pub. L. 280, and that the "decriminalization" of traffic infractions under RCW 46.63 does not constitute a new assertion of jurisdiction.

Analysis of the scope of Pub.L. 280 begins with the distinction between "criminal offenses" and "civil causes of action." The Supreme Court has interpreted Public Law 280's consent to state jurisdiction over "civil causes of action" as being limited to private causes of action, thereby precluding new state regulatory jurisdiction. *Bryan v. Itasca Cy.*, 426 U.S. 373, 384 (1976),[8] *see also, Thomsen v. King County*, 39

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[8] In *Bryan v. Itasca County*, 426 U.S. 373 (1976) the Supreme Court analyzed the language of Pub. L. 280 and Congress's intent. It held that the consistent and exclusive use of the terms "civil causes of ac-

Wn. App. 505, 509, 946 P.2d 40 (1985). It has recognized that a grant to states of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values, including tribal self-government. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 107 S. Ct. 1083, 1088 (1987); *see also Thomsen v. King Cy.*, *supra* at 510. Therefore, when a state seeks to enforce a law within an Indian reservation under the authority of Pub.L. 280, "it must determine whether the law is criminal in nature, and thus fully applicable to the reservation under § 2, or civil in nature, and applicable only as it may be relevant to private civil litigation in state court." *Cabazon, supra* at 1088. The court went on to approve the Ninth Circuit's distinction[9] between state "criminal/prohibitory" laws and state "civil/regulatory" laws:

(Footnote Continued)

tion "aris[ing] on," "civil law* * *of general application to private persons or private property," and "adjudicat[ion]" in both the Act and its legislative history compelled the conclusion that § 4 was primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting state courts to decide such disputes. *Id. at 383-84.* It concluded by quoting Israel & Smithson, *Indian Taxation, Tribal Sovereignty and Economic Development*, 49 N.D. L. Rev. 267, 396 n. 8 (1973), that "Congress never intended 'civil laws' to mean the entire array of state noncriminal laws, but rather * * * those laws which have to do with private rights and status. Therefore, 'civil laws* * * of general application to private persons or private property' would include the laws of contract, tort, marriage, divorce, insanity, descent, etc., but would not include laws declaring or implementing the states' sovereign powers, such as the power to grant franchises, etc. These are not within the fair meaning of 'private' laws." *Id.* at 384

[9]*See Barona Group of Capitan Grande Band of Mission Indians and Diego Cy. v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929; and *Bryan v. Itasca Cy.*, 426 U.S. 373 (1975).

> if the intent of a state law is generally to prohibit certain conduct, it falls within Pub.L. 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub.L. 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

Id. (Emphasis added.)

In determining whether a state law is criminal/prohibitory or civil/regulatory, the applicable state laws governing the particular activity must be examined in detail. *Id.* at 1089 n.10. The prohibitory/regulatory distinction is not a bright line rule. *Id.* at 1089. Merely because an otherwise regulatory law is enforceable by criminal as well as civil means does not mean that it is converted into a criminal law within the meaning of Pub.L. 280. *Id.* Nor should the converse be true, that merely because it is "decriminalized" it should be classified as a regulatory law outside the scope of Pub.L. 280.

For example, Washington's fireworks law has been held to be a prohibitory rather than a regulatory law, despite the fact that certain exhibitions of prohibited fireworks are authorized. *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). The Ninth Circuit distinguished the possession of fireworks from other regulatory schemes such as hunting and fishing, where the person who wishes to hunt or fish merely has to pay a fee and obtain a license.

> "The purpose of such statutes is to regulate the described conduct and to generate revenues. In contrast, the purpose of the fireworks laws is not to generate income, but rather to prohibit their general use and possession in a legitimate effort to promote the safety and health of all citizens."

Id. at 1364. Likewise, a forfeiture proceeding has been held to be quasi-criminal in character, because its object, like criminal proceedings, is to penalize for the commission of an offense against the law. *Quechan Tribe v. Rowe*, 531 F.2d 408, 411 (9th Cir. 1976).

Plaintiffs argue that Washington's scheme of traffic infraction enforcement is civil/regulatory in nature and therefore lies outside the scope of Pub.L. 280's consent to state jurisdiction. In support of this argument they cite Opinion of the Attorney General of Washington, 1981, No. 4, which states that any prosecution for violation of a traffic infraction is civil in nature, as are the monetary penalties which may be imposed (Ct. Rec. 5, Ex. E). Violations do not justify a citizen's arrest, since they are neither felonies nor misdemeanors. *Wenatchee v. Durham*, 43 Wn.App. 547, 551 n. 3, 718 P.2d 819 (1986). This is not persuasive, as it focuses on titles and the type of penalty, rather than the recognized test of conduct which violates the state's public policy.

Support for plaintiff's position regarding the regulatory nature of the traffic "infraction" statutes is found in *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978). *Best* involved a defendant charged with drunk driving on an Air Force base. Defendant was sentenced to 10 days in jail, a fine, and a license suspension. The Ninth Circuit reversed the license suspension, holding that the Assimilated Crimes Act incorporated only the criminal laws of California. California case law held that departmental suspensions of licenses were regulatory, not penal, since they were not "punishments" under California law. Therefore, the court determined that the provision of the California Vehicle Code providing for court-ordered suspension of drivers' licenses was also regulatory, not punitive. In reaching this decision, the court cited *Beamon v. Department of Motor Vehicles*, 180 Cal. App.2d 200, 210, 4 Cal. Rptr. 396, 403 (1960):

> The suspension of or revocation of a license is not penal; its purpose is to make the streets and highways safe by protecting the public from incompetence, lack of care, and wilful disregard of the rights of others by drivers. [citations omitted] The fact that petitioner may suffer inconvenience and even economic loss because he has been denied a license does not make the remedial action of the department the imposition of punishment for past offenses.

Id. at 1098-1100.

In light of the more recent Supreme Court decision in *Cabazon*, 107 S.Ct. 1083, and the Ninth Circuit's decision in *Barona Group of Capitan Grande Band of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929, this court must find that the *Best* court's analysis is no longer sufficient, since it did not address the public policy concern. *Best* is also distinguishable, in that it involved the Assimilated Crimes Act and state law which specifically identified the license suspension scheme as regulatory.

Plaintiffs argue that it is unnecessary to look beyond the face of the statute to determine whether it is criminal/prohibitory or civil/regulatory, since it clearly states that it is civil. However, both the Supreme Court and the Ninth Circuit have been unwilling to make jurisdictional decisions based upon bald assertions that a statute is criminal or civil. Instead, the court must look closely at the public policy behind the statute, to determine whether the regulated behavior violates that policy. *California v. Cabazon Bank of Indians*, 480 U.S. 202, 94 L.E.2d 244, 107 S.Ct. 1083 (1987); *Barona Group of Mission Indians v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert denied*, 461 U.S. 929. Plaintiffs argue that Washington encourages the use of motor vehicles by encouraging tourism and providing highway rest areas, information centers, maps, etc. However, this ignores the clear policy against actions such as speeding, which endanger the public. The fact that driving is not itself against public policy does not support a conclusion that reckless driving, speeding, etc., are not. The intent of traffic infraction laws is to prohibit certain behavior. Such laws therefore fall within the criminal/prohibitory classification of Pub.L. 280. The fact that incarceration is no longer a sanction for certain less serious offenses does not change that conclusion. It is the public policy violation that determines that the conduct is prohibitory in nature.

Plaintiff also argues that if the court does not find Washington's decriminalized traffic code clearly civil, then it is ambiguous and should be construed in favor of the Tribes. Support for this proposition is found in the Supreme

Court's policy in construing Indian treaties and federal statutes which affect tribal sovereignty. The Court has developed special rules of construction of Indian treaties which create a strong presumption that treaty rights have not been abrogated or modified by later federal legislation. Under these rules Congress must show a "clear and plain" intention to abrogate Indian treaty rights. *See Menominee Tribe v. United States*, 391 U.S. 404 (1968) (termination act did not contain an explicit statement abrogating hunting and fishing rights); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658 (1979). Statutes, agreements, and executive orders dealing with Indian affairs have also been construed liberally in favor of establishing Indian rights, and narrowly in favor of retaining Indian rights. Cohen, *Handbook of Federal Indian Law* (1982). *See United States ex rel. Haulpai Indians v. Santa Fe P. R.R.*, 314 U.S. 339 (1941) (Indian title could not be extinguished expect [sic] by a clear and plain expression of intent by Congress); *Bryan v. Itasca Cy.*, 426 U.S. 373 (1976) (Indians' right to be free from state taxation jurisdiction not eliminated by Pub.L. 280); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) (Indian Bill of Rights Act strictly construed to limit the availability of federal judicial review of tribal action).

This court does not find Washington's traffic code ambiguous; therefore, plaintiff's argument is not persuasive. It is compelled to find that Washington's traffic "infraction" code is designed to promote the strong public policy of protecting the safety and health of its citizens on public highways. RCW 37.12.010 assumed both "civil" and "criminal" jurisdiction over motor vehicles. The intent of the legislature is clear that it did not intend to focus on labels. Rather, the substance of the law, and the clear public policy concerns underlying it, compel a holding that Washington's traffic laws are within Pub.L. 280's consent to state jurisdiction for offenses committed on public roads.

Jurisdiction on State Highways over Reservations

Under RCW 37.12.010, the state assumed both civil and criminal jurisdiction over Indians and Indian territory

for the operation of motor vehicles upon the public streets, alleys, roads and highways. The question arises whether roads across reservation lands are within the scope of this statute.

Pursuant to 25 U.S.C. § 311, the Secretary of the interior was granted the authority in 1901 to grant permission to State or local authorities for the establishment of public highways through Indian reservations, including allotted lands which had not been conveyed with full power of alienation. Primary State Highway No. 10 appears to have been constructed in accordance with that statute. However, 25 U.S.C. § 311 is not a general grant of jurisdiction to the states over the land constituting the right-of-way. *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983). Rights of way running through a reservation remain part of the reservation and are within the territorial jurisdiction of the tribal court. *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1180 (9th Cir. 1975).[10] However, the state does not claim title to the rights of way. It merely asserts that they are public roads and that therefore vehicles operated on them are

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[10]Any confusion regarding the status of rights-of way through Indian reservations was cleared up by congress in 1948 when it enacted 18 U.S.C. § 1151 defining Indian country as "all land within the limits of any Indian reservations under the jurisdiction of the United States Government * * * including rights-of-way running through the reservation. Although this statute appears in the federal criminal code, the Supreme Court recognized that the statute's definition also applies to questions of federal civil jurisdiction and to tribal jurisdiction. *DeCoteau v. District Cy. Court*, 420 U.S. 425, 427 n.2 (1975). *See also, State v. Webster*, 338 N.W.2d 474, 479 (Wis. 1983).

subject to concurrent state jurisdiction pursuant to RCW 37.12.010. The Washington State Supreme Court agreed in a similar controversy arising on the Makah reservation. There, the court held that the federal government had reserved to itself the right in its treaty with the Makahs to build roads on reservations where necessary for the public convenience, and the record supported the argument that they were so built; therefore, the state has authority to enforce its civil and criminal laws against members of the tribe on the reservation roads. Such roads are "public highways" within the meaning of RCW 37.11.010(8). *Makah Indian Tribe v. State*, 76 Wn.2d 485, 492-93, 457 P.2d 590 (1969).

In conclusion, this court holds that Washington's traffic infraction statute is prohibitory in nature and therefore comes within Congress's grant of criminal jurisdiction conferred upon the states under Pub.L. 280. Washington's decriminalization of those offenses and the transfer of jurisdiction over them to district and municipal courts does not represent an expansion of jurisdiction requiring the consent of the individual members of the Tribe. The Washington courts therefore have jurisdiction to hear cases involving traffic violations occurring on public roads. This decision is limited to infractions occurring on roads within reservation boundaries which were built wholly or in part with Government funds, and are within the meaning of "public" roads.

IT IS HEREBY ORDERED THAT:

1. Plaintiffs' motion for summary judgment **SHALL BE DENIED**.

2. Defendant's motion for summary judgment **SHALL BE GRANTED.**

3. Plaintiff's motion for preliminary injunction **SHALL BE DENIED AS MOOT.**

4. Plaintiff's complaint and the claims therein **SHALL BE DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED. The Clerk is directed to enter this Order and forward copies to counsel.

DATED this 13th day of December, 1988.

JUSTIN D. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

APPENDIX C

STATUTORY PROVISIONS

Pub. L. 280 § 2; 67 Stat. 588 (1953); 18 U.S.C. § 1162:

(a) Each of the States or Territories listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory:

State or Territory of	*Indian country affected*
Alaska	All Indian country within the State, except that on Annette Islands, the Metlakatla Indian community may exercise jurisdiction over offenses committed by Indians in the same manner in which such jurisdiction may be exercised by Indian tribes in Indian country over which State jurisdiction has not been extended.
California	All Indian country within the State.
Minnesota	All Indian country within the State, except the Red Lake Reservation.
Nebraska	All Indian country within the State.
Oregon	All Indian country within the State, except the Warm Springs Reservation.
Wisconsin	All Indian country within the State.

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent

with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section as areas over which the several States have exclusive jurisdiction.

Pub. L. 280 § 4; 67 Stat. 589 (1953); 28 U.S.C. § 1360:

(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

State of	*Indian country affected*
Alaska	All Indian country within the State
California	All Indian country within the State
Minnesota	All Indian country within the State except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent

with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section.

Pub. L. 280 § 6; 67 Stat. 589 (1953):

Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act. Provided, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Wash. Rev. Code § 37.12.010 (1989):

The state of Washington hereby obligates and binds itself to assume criminal and civil jurisdiction over Indians and Indian territory, reservations, country, and lands within this state in accordance with the consent of the United States given by the act of August 15, 1953 (Public Law 280, 83rd Congress, 1st Session), but such assumption of jurisdiction shall not apply to Indians when on their tribal lands or allotted lands within an established Indian reservation and held in trust by the United States or subject to a restriction against alienation imposed by the United States, unless the provisions of RCW 37.12.021 have been invoked, except for the following:

(1) Compulsory school attendance;
(2) Public assistance;
(3) Domestic relations;
(4) Mental illness;
(5) Juvenile delinquency;
(6) Adoption proceedings;
(7) Dependent children; and
(8) Operation of motor vehicles upon the public streets, alleys, roads and highways: *Provided further*, That Indian tribes that petitioned for, were granted and became subject to state jurisdiction pursuant to this chapter on or before March 13, 1963 shall remain subject to state civil and criminal jurisdiction as if chapter 36, Laws of 1963 had not been enacted.

Wash. Rev. Code § 46.63.020:

Failure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction and may not be classified as a criminal offense, except for an offense contained in the following provisions of this title or a violation of an equivalent administrative regulation or local law, ordinance, regulation, or resolution:

(1) RCW 46.09.120(2) relating to the operation of a nonhighway vehicle while under the influence of intoxicating liquor or a controlled substance;

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(10) RCW 46.20.021 relating to driving without a valid driver's license;

* * * *

(12) RCW 46.20.342 relating to driving with a suspended or revoked license;

(13) RCW 46.20.410 relating to the violation of restrictions of an occupational driver's license;

(14) RCW 46.20.416 relating to driving while in a suspended or revoked status;

(15) RCW 46.20.420 relating to the operation of a motor vehicle with a suspended or revoked license;

* * * *

(22) RCW 46.52.010 relating to duty on striking an unattended car or other property;

(23) RCW 46.52.020 relating to duty in case of injury to or death of a person or damage to an attended vehicle;

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(25) RCW 46.52.100 relating to driving under the influence of liquor or drugs;

* * * *

(33) RCW 46.61.500 relating to reckless driving;

* * * *

(35) RCW 46.61.520 relating to vehicular homicide by motor vehicle;

(36) RCW 46.61.522 relating to vehicular assault;

(37) RCW 46.61.525 relating to negligent driving;

(38) RCW 46.61.530 relating to racing of vehicles on highways;

* * * *

(43) Chapter 46.65 RCW relating to habitual traffic offenders[.]